ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION IV

CA 05-1258

December 13, 2006

LERONDRIA MONTGOMERY, APPELLANT	AN APPEAL FROM PULASKI COUNTY CIRCUIT COURT [NO. JN 2004-1351]
V.	HON. WILEY A. BRANTON, JUDGE
ARKANSAS DEPARTMENT OF HUMAN SERVICES, APPELLEE	AFFIRMED; MOTION TO BE RELIEVED GRANTED

This is a no-merit appeal from an order terminating the parental rights of Lerondria Montgomery, whose three children were removed from her custody in 2001 and placed with her mother, Audrey Montgomery. The termination petition was filed because, against court orders, the children were placed in appellant's care when Audrey went out-of-state, and during this time, appellant attacked one of her sons with a knife.

We ordered rebriefing in this case because appellant's counsel failed to address an adverse ruling, the denial of appellant's motion for continuance during the termination

hearing.[1] On resubmission, counsel adequately addresses the three adverse rulings in this case. Appellant also submits *pro se* points for reversal but appellee Arkansas Department of Human Services (ADHS) did not submit a responsive brief. We affirm the termination order and grant counsel's petition to be relieved.

I. Background Facts

Appellant's children are M.B., d.o.b., 5-26-91; D.J., d.o.b., 1-4-94; and B.M., d.o.b., 4-17-97. A prior case was opened on these juveniles in November 2001 when appellant's live-in-boyfriend, Jason Whitt, struck M.B. in the face with an extension cord. Appellant thereafter appeared in court drunk, with a blood alcohol content of .326, and made no measurable progress toward reunification. In December 2001, the children were placed in Audrey's permanent custody based on appellant's exposure of the children to aggravating circumstances.

During the court proceeding in which the trial court granted Audrey custody of the children, and in the subsequent written order memorializing its findings, the trial court instructed Audrey that the children were not to be placed with appellant without a court order approving the arrangement. In addition, the court ordered that Whitt was to have no contact with the children. Despite the court's orders in the prior case, the children again came to be in appellant's care sometime in 2004, after Audrey went to Chicago, Illinois. Audrey left the

[1]*See Montgomery v. Arkansas Dep't of Human Servs.*, No. 05-1258 (June 14, 2006) (not designated for publication).

children with her sons, who later left the children with appellant.

The instant case was opened in July 2004, when the children were removed from appellant's home after appellant, who was still living with Whitt and who had been drinking for five days, attacked M.B. with a knife. In D.M.'s presence, appellant threatened to kill M.B. and attacked him with a hunting knife because he would not tell her where he had hidden her beer. Appellant cut M.B.'s arm, hit him near his eye with the blunt end of the knife, and bit him. Based on this incident, the children were removed from Audrey's custody. B.M. was placed with Doretha Harris (B.M.'s godmother), while M.B. and D.M. remained in ADHS's care.

The goal of the case originally was reunification with Audrey. Reunification services were ordered both for Audrey and appellant, including random drug screens, a psychological evaluation, parental classes, and anger-management classes. Appellant was also ordered to obtain stable housing and was awarded supervised visitation. In February 2005, appellant, for the first time, was found to be in compliance with the case plan. Nonetheless, the case proceeded to termination based on the finding that appellant and Audrey were unfit.

The termination hearing was held on June 21, 2005. During the hearing, the trial court took judicial notice of the prior case. The court noted that in the prior case, appellant made no measurable progress toward reunification and continued to live with Whitt. The court further stated that it would have terminated appellant's parental rights in the prior case had it not been for the court's belief that Audrey was a fit custodian.

In the instant case, the evidence showed that at the time of the termination hearing, appellant had not obtained stable housing, was living with friends, had been employed for only three weeks, and had not begun anger management courses. In addition, Audrey admitted that she allowed the children to stay with appellant on other occasions, but she said that she was told by an ADHS worker from another county that such visits were permitted because the prior case had been closed. Audrey also maintained that she left the children in her sons' care when she went to Chicago. Despite her previous testimony that she had not moved to Chicago, and that she left only to take care of her brother's estate and intended to return to Arkansas, Audrey admitted that she had actually moved to Chicago. The court noted Audrey's "serious credibility issues" and found that she had "outright lied to the court."

D.M.'s aunt testified that she was interested in adopting all three children; B.M.'s godmother, with whom B.M. had been living, was interested in adopting her. The court terminated appellant's parental rights, finding that ADHS had proved the children had again been exposed to aggravating conditions by virtue of appellant's attack on M.B. with a hunting knife. The court noted its belief that M.B. could have been killed and stated that the children should not have been placed in appellant's custody.

The court also found that it was unlikely that appellant would be able to rehabilitate herself, based on the psychological evaluation conducted by Dr. Paul Deyoub, who evaluated both appellant and Audrey. Dr. Deyoub noted that in his two examinations of appellant in November/December 2004, she smelled of liquor and admitted that she drinks three twenty-

ounce beers each day. She also admitted to Dr. Deyoub that she had no residence and had been staying in hotel rooms.

Dr. Deyoub assessed appellant with mild mental retardation, personality disorder, and severe alcohol dependence. He opined that appellant's chances of rehabilitating herself were nearly "zero." As the court noted, even appellant's own therapist, who maintained that appellant had been making progress, felt that appellant would need from six months to one-and-one-half years before reunification could even be considered.

Based on this evidence, the trial court found that it was in the children's best interests to terminate appellant's parental rights.

II. Termination Order

Counsel may petition to be relieved on appeal in a termination of parental rights case, if, after a conscientious review of the record, he finds no issue of arguable merit for appeal. *Linker-Flores v. Arkansas Dep't of Human Servs.*, 359 Ark. 131, 194 S.W.3d 739 (2004) (*Linker-Flores I*). Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal. *Id.* In evaluating a no-merit brief, the issue for the court is whether the appeal is wholly frivolous or whether there are any issues of arguable merit for appeal. *Id.*

The main adverse ruling is the termination determination. A circuit court may terminate parental rights if the court finds that there is an appropriate permanency placement plan for the juvenile; finds by clear and convincing evidence that termination is in the best

interest of the children considering the likelihood that the child will be adopted and the potential harm the child would suffer if returned to the parent's custody; and finds that at least one statutory ground for termination exists. *See* Ark. Code Ann. § 9-27-341(b)(3) (Supp. 2005). Clear and convincing evidence is that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established. *See* Camarillo-*Cox v. Arkansas Dep't of Human Servs*., 360 Ark. 340, __S.W.3d ___ (2005). When the burden of proving a disputed fact is by clear and convincing evidence, the inquiry on appeal is whether the trial court's finding is clearly erroneous. *Linker-Flores I*, *supra*. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Camarillo-Cox*, *supra*. In resolving the clearly erroneous question, we give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Camarillo-Cox*, *supra*. We review such cases *de novo* on appeal. *Camarillo-Cox*, *supra.*

The termination hearing was held on June 21, 2005. The statutory ground cited by the trial court was aggravating circumstances, which means that a child has been abandoned, chronically abused, subjected to extreme or repeated cruelty, or sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification. Ark. Code Ann. §§ 9-27-341(b)(3)(ix)(3)(A) and (B)(i) (Supp. 2005) and 9-27-303(6)(A) (Supp. 2005). Because appellant subjected M.B. and D.M. to extreme cruelty, an appeal from the termination order would be wholly without

merit.

First, in direct violation of the court's previous order, appellant kept the boys in the home of the same man who had on a prior occasion beaten M.B. with an extension cord. Further, while in the throes of a five-day drinking binge, and in D.M.'s presence, she threatened to kill M.B. and attacked him with a hunting knife because he would not tell her where he had hidden her beer. Appellant cut M.B.'s arm, hit him near his eye with the blunt end of the knife, and bit him. While B.M. was not a witness to this incident, parental unfitness is not necessarily predicated upon the parent causing some direct injury to the child in question. *Brewer v. Arkansas Dep't of Human Servs.*, 71 Ark. App. 364, 43 S.W.3d 196 (2001).

Second, an appeal from the court's determination that termination was in the children's best interests and that continued contact with appellant would be harmful to them would be wholly without merit. The evidence showed that even though appellant was apparently no longer involved with Whitt at the time of the termination hearing, the fact is that she continued her relationship with the man who beat M.B. and exposed her children to him even after the court ordered that he have no contact with the children. Further, at the time of the termination hearing, appellant had not obtained stable housing, was living with friends, had been employed for only three weeks, and had not begun anger-management courses. While appellant's caseworker stated in February 2005 that appellant was in compliance with the case plan, last minute efforts to comply with the case plan will not preclude a finding that

termination is warranted. Ark. Code Ann. § 9-27-341(a)(4)(A); *see also Camarillo-Cox*, *supra*.

Third, the fact that appellant's own counselor stated that reunification could not be considered for at least six months, and possibly up to one-and-one-half years, supports that there was little likelihood that reunification could be accomplished in a timely manner from the children's perspectives. The purpose of the statute regarding termination of parental rights is to provide permanency in a juvenile's life in all instances where the return of a juvenile to the family home is contrary to the juvenile's health, safety, or welfare and where it appears from the evidence that a return to the family home cannot be accomplished in a reasonable period of time as viewed from the juvenile's perspective. *See* Ark. Code Ann. § 9-27-341(a)(3).

Finally, the court's finding that the ADHS had an appropriate care plan and that the children were adoptable does not provide a basis for reversal. D.M.'s aunt testified that she was interested in adopting all three children; B.M.'s godmother, with whom B.M. had been living since February 2005 and with whom B.M. stayed with regularly before then, was interested in adopting her. Thus, there was evidence that the children were adoptable. On these facts, a challenge to the sufficiency of the evidence supporting termination would be wholly without merit.

III. Other Adverse Rulings

There were two other adverse rulings, neither of which would support a meritorious

appeal. The first is the trial court's overruling of a hearsay objection raised when a witness was apparently on the verge of testifying as to what Whitt said when he answered the door when the witness went to inform appellant that she had a phone call at the witnesses's home. Appellant's counsel objected on the basis of hearsay because Whitt was not present in the courtroom. The court overruled the objection, stating that the witness was allowed to identify the man who answered the door. The witness then stated that the man identified himself as Jason Whitt, but did not further testify as to any comments Whitt made.

This evidence of Whitt's identification may have been admitted in violation of the hearsay rule, Arkansas Rule of Evidence 801, because it was admitted to prove the truth of the matter that appellant was living with Whitt. Nonetheless, this error would be harmless, because other evidence was admitted without objection establishing that appellant had been living with Whitt and was living with Whitt when she attacked M.B. Thus, the hearsay testimony was merely cumulative and would not support reversal of the termination determination. *See, e.g., Waeltz v. Arkansas Dep't of Human Servs.*, 27 Ark. App. 167, 768 S.W.2d 41 (1989) (holding that the testimony that child told the foster parent that the father had sexually abused his children and that his stepmother had pulled the father off of another child was admissible, where the social workers had previously related without objection the children's detailed statements regarding sexual and physical abuse by father).

The remaining adverse ruling occurred when appellant's counsel filed a joint motion for a continuance, speaking for herself, and on behalf of Audrey's counsel, as well as counsel

for D.M.'s father. This joint request was based, in relevant part, on the "shake-up" at ADHS because appellant's caseworker, Juanita Lloyd, left ADHS one month prior to the hearing. This meant that the new caseworker had the three-and-one-half-year-old case for only one month at the time of the termination hearing. Further, no one else at ADHS answered Lloyd's voice mails during that time because they did not know that her voice mail was still activated.

In short, the denial of appellant's motion for a continuance does not offer a meritorious basis for an appeal because appellant did not assert or demonstrate any specific prejudice caused by the "shake-up" at ADHS or by the trial court's denial of the motion for a continuance. Notably, the decision to change the case plan to termination occurred in February 2005 – *before* Lloyd left the agency. The mere fact that a new caseworker was assigned to appellant's case one month before the termination hearing, well after the case plan had been changed to termination, does not by itself establish that appellant suffered prejudice.

Moreover, in denying the request for a continuance, the trial court was appropriately concerned about the children's need for permanency. The trial court questioned, "If you get more time, how does that translate into a better hearing?" The only response to this question was the assertion of D.M.'s counsel that "We have no idea what's been going on in this case." The court obviously weighed that vague assertion against the remainder of the time in this case in which the parties did *not* suffer from a lack of information due to a new caseworker. In correctly denying the motion, the court stated, "We've been at this too long. We're going forward. I'm duty-bound to try to get permanency for these kids."

Accordingly, because an appeal from any of the adverse rulings in this case would be wholly frivolous, we affirm the termination order and grant counsel's motion to be relieved.

IV. Appellant's Pro Se Points

Finally, appellant offers *pro se* points for reversal. She asserts that her parental rights should not be terminated due to the progress she has made since the termination hearing, proof of which is not part of the record in this case. However, we will not consider arguments based on matters not contained in record; nor will we reverse based on facts outside of the record. *AM Credit Corp. v. Riley*, 35 Ark. App. 168, 815 S.W.2d 392 (1991). Accordingly, appellant's *pro se* points do not offer any ground for reversing the trial court's order.

Affirmed; motion to be relieved granted.

HART and BIRD, JJ., agree.